

FITZHUGH *v.* LEVEE DISTRICT.

Decided February 21, 1891.

Levee tax—Counter-claim.

One against whose lands a levee tax has been assessed, pursuant to the provisions of chapter 95 of Mansfield's Digest, cannot set-off against the assessment a claim which he may have against the levee district.

APPEAL from *Phillips* Circuit Court in chancery.

M. T. SANDERS, Judge.

The Cotton Belt Levee District No. 1 of Phillips county, instituted proceedings in equity to charge the lands of Fitzhugh and wife for levee taxes assessed against the lands, in pursuance of chapter 95 of Mansfield's Digest. Defendants set up a counter-claim that, before the construction of the levee for which the assessment was made, they had built a private levee, of which plaintiff had taken possession without their consent and without payment. For its value they asked judgment.

Testimony was introduced to show the value of the private levee. The court disallowed the counter-claim, and rendered a decree for the amount claimed in the complaint.

Palmer & Nichols for appellant.

The court erred in ignoring the counter-claim. Appellants were entitled to compensation for their levee. Hare on Cont., p. 233; 3 Am. & Eng. Enc. of Law, 860; 3 N. H., 384; 1 Chitty on Cont., 79, *et seq.*; 2 Addison on Cont., 584; 1 *id.*, 53-4; 2 Wharton on Cont., sec. 708; 1 Story on Cont., secs. 11, 12, 12a; 8 Ark., 202; 55 Vt., 417; 144 Mass., 65; Anderson, Dict., 248.

Stephenson & Trieber and *P. O. Thweatt*, for appellee.

These special assessments are really nothing but taxes. 21 Ark., 40; 53 Wisc., 178; Cooley, Tax., 416; 52 Ark., 356; Mansf. Dig., sec. 4378; Acts 1887, chap. 95. Taxes cannot be made the subject of set-off or counter-claim; 50 Ark., 384; 32 *id.*, 414.

PER CURIAM. The appellant concedes the right of the levee district to collect the amount assessed against his lands. His only contention is that he is entitled to set-off against the assessment a claim which he asserts against the district. The statute which authorizes the proceeding for raising a fund to pay for levees built in pursuance of its authority, does not provide for nor contemplate that character of relief. The assessment must be paid without regard to any claim for compensation which the appellant may have against the district.

Levee-tax—
Counter-claim.

Affirm.